Nos. 82-206, 82-229

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Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

—v.—

CARL W. STOTTS, et al.,
Respondents.

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,

—v.—

CARL W. STOTTS, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR NATIONAL ORGANIZATION FOR WOMEN; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; EQUAL RIGHTS ADVOCATES, INC.; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; NATIONAL CONFERENCE OF BLACK LAWYERS; NATIONAL WOMEN'S LAW CENTER; WOMEN EMPLOYED; AND WOMEN'S LEGAL DEFENSE FUND

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INTEREST AND DESCRIPTION OF AMICI CURIAE

This brief amicus curiae in support of respondents is submitted on behalf of the National Organization for Women; American Association of University Women; Equal Rights Advocates, Inc.; League of Women Voters of the United States; National Conference of Black Lawyers; National Women's Law Center; Women Employed; and Women's Legal Defense Fund.*

The National Organization for Women is the largest feminist organization in the United States, with a membership of over 225,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex dis-

*Letters from counsel for all parties, consenting to the filing of this brief, are being filed with the Clerk.

crimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid workforce is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination.

The American Association of University Women is a national organization of 190,000 college-educated women working for the advancement of women. Dedicated for 100 years to promoting the social and economic well being of all persons, the AAUW affirms its commitment to equal employment opportunity for women and men.

Equal Rights Advocates, Inc. is a San Francisco based, public interest le-

gal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the workforce because economic independence is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through ERA, Inc.'s participation, both as counsel and as amicus, in numerous employment discrimination cases.

The League of Women Voters of the United States is a nonpartisan, nonprofit membership organization, incorporated under the laws of the District of Columbia, with a current membership of 113,000 in 1250 state and local Leagues located in all states, the District of Columbia, Puerto Rico, and the Virgin

Islands. Since its inception in 1920, the League's purpose has been to promote political responsibility through informed and active participation of citizens in government. The League believes that no person or group should suffer legal, economic, or administrative discrimination, and is committed to the eradication of discrimination against minorities and women through affirmative action.

The National Conference of Black Lawyers is a membership organization of lawyers, scholars, legal workers, law students and other legal activists in the United States and abroad. The purpose of the organization is to promote and protect the interests of Black men and women in all phases of human life. Among the organization's primary concerns is the elimination of employment discrimination and the implementation and retention of viable affirmative action programs which serve to promote economic

equity for Black men and women in the United States.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose to protect and advance women's rights. The Center represents women's concerns before federal administrative agencies and courts. The Center has been involved in issues affecting the employment rights of women, and in particular has handled cases involving employment of women in nontraditional jobs.

Women Employed is a national organization, based in Chicago, with a membership of 3,000 women workers. Over the past ten years, the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Comliance Programs with regard to a broad range of sex discrimination issues.

Women's Legal Defense Fund is a non-profit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.

These organizations are dedicated to the principle of equal treatment under the law and to the elimination of sex and race discrimination in employment. Amici believe that the case before the Court is of great importance to the ability of the federal courts to provide effective remedies for employment discrimination.

SUMMARY OF ARGUMENT

The petitioners in this case ask the Court to subordinate a judicially-approved remedial order to a seniority-based layoff plan which threatened to wipe out the progress made, pursuant to consent decrees approved by the district court in 1974 and 1980, toward racial and sexual integration of the Memphis Fire Department.* The ability of the federal courts to protect remedial decrees, at issue in this case, directly affects the ability of women of all races and ethnic groups to obtain and maintain employment in state and local government services.

Systematic exclusion of women from employment in the protective services has been judicially acknowledged, and courts have acted to remedy the effects of this

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* Amici adopt the argument that this case is moot as contained in the brief for respondent.

discrimination. Increased availability of employment in municipal protective services is a critical factor in the struggle of many women to be economically self-sufficient. One of the most significant current demographic trends is the dramatic increase in the poverty of women. Institutionalized sex discrimination contributes to this trend and confines women to low status, low paying jobs. The serious economic plight of women underscores the critical importance of removing barriers to equal employment opportunity.

The national policy to eliminate discrimination in both public and private sectors, through Congressional legislation, is clear. However, despite enactment of various statutes prohibiting discrimination, minorities and women are still struggling to achieve equality. In addition to hiring barriers, the "last hired, first fired"

practice for structuring layoffs disproportionately affects women and minorities in a way that can eviscerate the modest progress made to date in integrating the work force. In order to enforce the broad policies against employment discrimination, the courts must be free to approve affirmative action plans, taking into consideration the effects and goals of such plans and the seniority expectations of the nonminority employees.

District courts are vested with broad equitable powers. To effectively address race and sex discrimination, the courts must retain flexibility and should not be deprived of the ability to employ practical wisdom in structuring remedies. In the instant case, the goals of the 1974 and 1980 consent decrees had not yet been accomplished when the layoff proposal was announced. There was sufficient evidence of discrimination in the record to support the district court's order.

ARGUMENT

POINT I

THIS CASE RAISES ISSUES HAVING A SIGNIFICANT IMPACT ON WOMEN'S OPPORTUNITIES TO BECOME ECONOMICALLY SELF-SUFFICIENT

In the instant case, this Court is presented with some of the consequences of the pervasive history of race discrimination in employment in a uniformed municipal service. No less severe, however, has been the systematic exclusion of women of all races from such protective services jobs as firefighting. The effects of the history of sex discrimination in protective services employ-

ment are being remedied very slowly.[1/] The ability of the federal courts to protect remedial decrees, at issue in this case, directly affects the ability of all women to obtain and maintain employment in state and local government services.

Historically, women have been effectively barred from state and local uniform protective services by a variety of practices. One of the most common policies has been the complete segregation of women within the protective services, and their confinement to a few low-prestige jobs "appropriate" to their sex.

[1/] In New York City, for example, the qualifying test for firefighters was found to be sex discriminatory in 1982, N.Y. Times, Nov. 6, 1982, at 32, col. 5. The first women recruits for the New York City fire department entered training on September 22, 1982. N.Y. Times, Nov. 6, 1982, at 29, col. 3, and were sworn in as members of the force on November 5, 1982. Id.

> [Women] were not permitted to compete with men on [police] entrance examinations. Their eligibility was limited to a relatively few positions as 'police women' and 'police matrons'. They were given limited responsibility, primarily for processing, searching and care and custody of women prisoners and a limited amount of youth work. They were not used for patrol work. United States v. City of Chicago, 385 F. Supp. 543, 548 (N.D. Ill. 1974).

Additionally, women have been required to meet stricter educational criteria than men, mandating more years of formal education than men, e.g., Schaefer v. Tannian, 394 F. Supp. 1128, 1130 (E.D. Mich. 1974) (police). Moreover, not only have women been relegated to sex-segregated jobs, some departments have maintained strict quotas on the number of women hired. Id. at 1131. Sex-segregated schedules of entrance examinations have also been maintained, affording women substantially fewer opportunities than men to apply for the handful of positions open to them. Id. at 1130.

As a result of these widespread discriminatory practices, the participation of women in the uniformed state and municipal services has been extremely low. In 1960, women comprised only 4.1% of all workers in protective service occupations,[2/] Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 10, Table 11 (1980). By 1981, the percentage had risen to 10.1%. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982). Since women now constitute more than 42% of the paid labor force, these percentages

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[2/] The Bureau of the Census category of "protective service" work includes fire inspection and fire prevention occupations, firefighting occupations, police and detectives, sheriffs, bailiffs and other law enforcement officers, correctional institution officers, crossing guards, guards and police. Bureau of the Census, U.S. Dept. of Commerce, Classified Index of Industries and Occupations XIV (Nov. 1982).

reflect a gross underrepresentation of women.[3/]

Prior to 1972, when Title VII was amended to extend coverage to state and local government employment (Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §2000e et seq. (West 1981)), women were barely employed in the protective services at all. They constituted less than 3% of police, less than 5% of guards, and roughly one-half of one percent of all firefighters in 1972. Bureau of the Census, U.S. Dept. of Commerce, Statistical Ab-

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[3/] The percentages of women in these occupations vary dramatically among occupations, although women are substantially underrepresented in all. In 1981, women constituted 0.9% of all firefighters, 5.7% of all police officers, 7% of all sheriffs and bailiffs, and 13.7% of all guards. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 141 (March 1982).

stracts of the United States: 1981, 420 (1981).[4/]

Not surprisingly, since the enactment of the 1972 amendments, numerous cases alleging sex discrimination in protective services employment have been brought in the federal courts. A sampling of these cases shows a consistent pattern of denial of opportunities to women. In 1974, none of the firefighters in 45 Louisiana municipalities and parishes were women, United States v. City of Alexandria, 614 F.2d 1358, 1365 n.14 (5th Cir. 1980). In 1974, women constituted slightly over 2% of the police officers in Detroit, Schaefer v. Tannian, 394 F. Supp. at 1130; in 1973, women comprised less than 1% of the police

4/ Figures for the category of "sheriffs and bailiffs" are not available for this period.

officers in Chicago, United States v. City of Chicago, 385 F. Supp. at 548. In 1979, only 2.3% of the police officers in the cities of Yonkers and White Plains, New York were women, Complaint, United States v. City of Yonkers, 80 Civ. 7407 (S.D.N.Y. 1979), although in 1977 more than 20% of the applicants for officer positions in White Plains were women. Stipulation, id. (April 1981). In 1977, only three out of 91 trainees in the Nassau County, New York police academy were women. Memorandum and Order, United States v. Nassau County Police Dept., No. 76 C1869, at 15 (E.D.N.Y. July 21, 1978).[5/]

Women have not been comparably excluded from low-paid, low prestige civilian clerical and support jobs in the state and municipal services. In Nassau County, for example, in 1977 women constituted 0.6%

[5/]The other 88 trainees were white men.

of the sworn police department employees, but 78.9% of the civilian personnel in the department. Id. at 14.

Faced with clear and dramatic evidence of sex discrimination, the federal courts have found liability and provided for effective relief, including percentage hiring goals. See, e.g., United States v. City of Alexandria, 614 F.2d at 1368 (consent decree covering firefighter and police hiring); Schaefer v. Tannian, 394 F. Supp. at 1135 (order covering police hiring); United States v. City of Buffalo, 633 F.2d 643, 647 (2d Cir. 1980) (order covering firefighter and police hiring); United States v. City of Philadelphia, 499 F. Supp. 1196, 1204 (E.D. Pa. 1980) (injunction covering police hiring). In so doing, the courts have recognized both the importance of opening municipal service employment to women and the necessity of court orders to

assure the initial and continuing availability to women of these fundamentally important employment opportunities. In remedying the effects of sex discrimination, like racial discrimination, rigorous judicial scrutiny and remedial action are the strongest tools to prevent backsliding and solidifying the progress already made in the integration of municipal protective services.

Increased availability of employment in municipal protective services is important to the efforts of many women to become economically self-sufficient. The desperate economic position of women in our society--and growing poverty of women and children generally--is today widely acknowledged. See, e.g., Nat'l Advisory Council on Economic Opportunity. Critical Choices for the 80's (1980) [hereinafter cited as Critical Choices]; U.S. Comm'n on

Civil Rights, Women Still in Poverty (1979). Nearly one-third of all female-headed households are living below the poverty line, while only one in 18 male-headed households is in a similar position. Critical Choices at 17.[6/] In 1980, families maintained by women alone had the lowest median annual income of all families. Bureau of the Census, U.S. Dept. of Commerce, Characteristics of Households and Persons Receiving Selected Non-Cash Benefits: 1980 9 (1982) [hereinafter, Characteristics].

The situation is particularly grim for women with young children. In 1978, the median income of families headed by women

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[6/] Between 1980 and 1981, the number of poor families headed by women increased by 231,000, Bureau of the Census, U.S. Dept. of Commerce, Money Income and Poverty Status of Families and Persons in the United States: 1981 (Advance Data from the March, 1982 Current Population Survey) 3, Table B (1982).

whose children were under six was only $4,498, 30% of the median income for all families with children under six. Bureau of the Census, U.S. Dept. of Commerce, Families Maintained by Female Householders 1970-79 36 (1980). The National Advisory Council on Economic Opportunity has estimated that if current demographic trends continue, this nation's impoverished class by the year 2,000 will be comprised exclusively of women and children. Critical Choices at 19.

Among the major factors contributing to the precarious financial position of women are pervasive sex discrimination and job segregation in the workforce. Women comprise 42% of the workforce nationwide. Bureau of Labor Statistics, U.S. Dept. of Labor, Perspectives on Working Women: A Databook 3 Table 1 (1980). Yet, they are

concentrated in a small number of occupations which are marked by low pay and limited opportunities. In 1981, half of the 43,000,000 women in the paid labor force were employed in only 20 occupations. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings (March 1982). While 22% of all men were in three of the major occupation groups (sales, clerical and service), 64% of the women were employed in these occupations. Bureau of the Census, U.S. Dept. of Commerce, Wage and Salary Data from the Income Survey Development Programs 1979 3 (1982). There is evidence that the occupational segregation of women is increasing. For example, in late 1981 almost 75% of all clerical workers were women, Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings 22 Table A-21 (1982), as compared with 62% in 1950. Bureau of Labor

Statistics, U.S. Dept. of Labor, Employment in Perspective: Working Women 1 (Report No. 544, 1978).

Further, the wages for "women's jobs" lag behind those categories that are traditionally male jobs. The 1977 weekly wage for 18 of the "women's jobs" ranged from $59 for private household workers to $171 for sewers and stitchers. Bureau of Labor Statistics, U.S. Dept. of Labor, News: Trends in Weekly and Hourly Earnings for Major Labor Force Groups, Tables 1-3 (Nov. 2, 1977). In contrast, the 1977 average weekly wage for male-dominated jobs such as construction ($297), transportation and public utilities ($275), and motor vehicle retailers ($208) was far better. U.S. Comm'n on Civil Rights, Women Still in Poverty 19 (1979). But even within predominantly female occupations, women's wages are significantly below those received

by men. On average, a female sales worker, for example, is paid only 52% of wages paid to a male sales worker. Bureau of the Census, U.S. Dept. of Commerce, Money Income of Households, Families, and Persons in the United States: 1980 Table 55 (July 1982). Female clerical workers receive only 59% of the wages paid to male clerical workers. Id.

In view of persistent job segregation and the concomitant wage gap, it is not surprising that the median earnings of women in the paid work force is one half the median earnings of men. Bureau of the Census, U.S. Dept. of Commerce, Wage and Salary Data from the Income Survey Development Program: 1979 3, Table 1 (1982). The serious economic plight of women underscores the critical importance of removing barriers to equal employment opportunity.

It is only through assuring women truly equal access to jobs that we as a society can reverse these current trends and give women the real possibility of achieving economic self-sufficiency for themselves and their families.

POINT II

FEDERAL ANTI-DISCRIMINATION POLICY REQUIRES EFFECTIVE REMEDIES FOR EMPLOYMENT DISCRIMINATION BY GOVERNMENT EMPLOYERS

A. The 1972 Amendments to Title VII of the Civil Rights Act of 1964 Were Enacted to Redress Widespread Employment Discrimination In State and Local Government Employment

This Court has emphatically recognized that the intent of Congress, in enacting Title VII of the Civil Rights Act of 1964, was to "assure equality of employment opportunity and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). See also United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-419 (1975);

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Just over six years after the original Act was passed, Congress in 1972 reaffirmed its commitment to equal employment opportunity for all citizens, by amending Title VII to, inter alia, strengthen the enforcement powers of the Equal Employment Opportunity Commission and extend the provisions of the Act to employees of state and local governments. 86 Stat. 103, Sec. 701(f), 42 U.S.C. §2000e.

Explaining the need for these amendments, the House Report relied on a 1969 U.S. Commission on Civil Rights report[7] which found that "widespread discrimination against minorities exist[ed] in state and local government employment, and that the existence of this discrimination [was]

[7] U.S. Comm'n on Civil Rights, For All The People...By All The People, (1969)

perpetuated by the presence of both institutional and overt discriminatory practices." H.R. No. 238, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2152.

The House Report further noted that this type of employment discrimination was "particularly acute and had the most deleterious effect," id. at 2153, since it was being practiced in the governmental activities that were "most visible to the minority communities (notably education, law enforcement, and the administration of justice)..." Id.

The Chairman of the Equal Employment Opportunity Commission voiced a similar concern in testimony before the House of Representatives regarding the proposed amendments, noting that the "failure of state and local agencies to accord equal employment to their employees is particularly distressing in light of the impor-

tance that these agencies play in the daily lives of the local communities...." Equal Employment Opportunities Enforcement Act of 1971, Hearings on S.2515, 2619, H.R. 1746 Before the Subcomm. on Labor of Senate Comm. on Labor & Public Welfare, 92d Cong. (1971).

Nowhere are these concerns more evident or troublesome than in the continuing and almost total exclusion of women and minorities from local protective service departments--agencies closely identified with the overall protection of the public, and therefore perhaps the most visible of all occupations.

B. Government Employment Practices, Such As Seniority-Based Lay-Off Plans, Cannot Be Allowed To Frustrate Efforts To Remedy Discrimination.[8]

1. The use of the "last hired-first fired" principle to reduce employment in times of economic recession has a disproportionate impact on minorities and women.

Despite the enactment of federal,

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[8] Amici recognize, of course, the immunity afforded bona fide seniority plans under §703(h) of Title VII by this Court's ruling in Teamsters v. United States, 431 U.S. 324 (1977). At issue in this case, however, is not the lawfulness, under Title VII, of the seniority system of the City of Memphis fire department, but rather the appropriateness, under Title VII remedial principles, of relief which implicates a seniority plan. It is in this context only that amici urge a temporary restructuring of the "last hired-first fired" principle.

state, and local statutes and presidential orders which prohibit discrimination in employment,[9] equal employment opportunity remains an unrealized goal for many of this country's minority and women paid workers. For these people, serious barriers to their entrance into and continued participation in the paid job market continue to exist. Significant among these is the "last hired, first fired" practice for structuring layoffs, which has disproportionately affected minorities and women, particularly during our nation's most recent economic troubles. As the

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[9] See, e.g., 42 U.S.C.A. §1981 (West 1981); 42 U.S.C.A. §1983 (West 1981); Title VI, §601 of the Civil Rights Act of 1964, 42 U.S.C.A. §2000d (West 1981); Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §2000e et. seq. (West 1981); Exec. Order 11246, 30 Fed.Reg. 12319 (1965), as amended by Exec. Order 11375, 32 Fed. Reg. 14303 (1976); Public Works Employment Act of 1977, 42 U.S.C.A. §6705(f)(2)(West 1983).

United States Commission on Civil Rights pointed out in its 1977 Report Last Hired, First Fired: Layoffs and Civil Rights 1, (1977) [hereinafter cited as Last Hired, First Fired]:

> The long and extensive use of this policy by employers is one reason why income remains consistently lower and unemployment rates higher for these groups than for the labor force as a whole.

See Point I, supra.

Review of the impact of the 1974-75 recession on the employment status of minority and women workers highlights the devastating effects which can result from such layoffs. Between the end of 1973 and mid-year 1975, the unemployment rate for adult women rose steadily from 5.9% to 8.5%. Last Hired, First Fired at 10. Jobless rates reached 14.3% for non-whites, and 12.4% for Hispanic workers by mid-1975, as compared to 8.2% for white workers generally. Id.

Unemployment resulting from layoffs during that time period rose most sharply in those blue collar occupations where minority employees were most likely to be concentrated. Id. While the concentration of women workers in trade and services industries cushioned the impact of layoffs for women employees overall,[10] nonetheless, women who had broken into traditionally male jobs such as the assembly line of automobile plants or as patrol officers on police forces, were heavily affected by job loss. Id. Moreover, in some industries where minorities represented only 10-12% of the workforce, they accounted for 60-70% of those workers laid off in 1974. Id. at 24-25.

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[10] Cyclical changes in employment rates are generally less dramatic in trade and services than in goods-producing industries. Last Hired, First Fired at 11.

The impact of layoffs on government employees has been no less severe. For example, in mid-1975, the New York City Police Department laid off 371 of its 680 female police officers, out of a total force of almost 26,000. Id. Over half of all Hispanic workers in New York City lost their jobs between 1974 and 1975. Id. More recently, minority workers have accounted for 2335 of the 2944 layoffs of public sector employees ordered in Detroit between 1980-82. Bureau of National Affairs, Layoffs, Rifs, and EEO in the Public Sector: A BNA Special Report

23 (February 1982).[11/]

In April 1975, the United States Department of Labor reported that "recently hired workers, including many women and minority

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11/ Federal employees have fared no better. In 1981, 11,845 employees of the Federal government were laid off because of budget cuts. Bureau of National Affairs, Layoffs, Rifs, and EEO In The Public Sector: A BNA Special Report 5 (February 1982). These layoffs were 50% higher for minority employees than non-minority employees. Id. Among administrative employees, women were laid off at a rate 61% greater than men; minority workers in administrative positions experienced layoffs at a rate 3.5 times the average rate. Id. In the first two quarters of 1982, 5321 federal employees were laid off; nearly 63% of these laid off employees were women, and women and minority men together comprised nearly 80% of the layoffs. Summary of Task Force RIF Survey, Quarter 1 and Quarter 2 Fiscal Year 1982. (Federal Government Service Task Force). In the third quarter of 1982, 1393 federal employees were laid off, 50.6% of whom were women. The combined percentage of women and minorities laid off was 70.9%. Reduction In Force Survey Third Quarter Fiscal Year 1982 (Federal Government Service Task Force).

group members, have become early casualties of the economic downturn." Last Hired, First Fired at 10. Statistics reflecting the most recent federal layoffs, supra n. 11, demonstrate that the effects of the current recessionary cycle on the employment patterns of women and minorities are similarly disproportionate and injurious. Clearly, if affirmative measures designed to counteract these results are not instituted and adopted, "the opportunties [for women and minorities] laboriously created in the 70's may be destroyed during hard times in the 80's." U.S. Comm'n on Civil Rights, Affirmative Action In the 1980's: Dismantling The Process of Discrimination 36 (1981) [hereinafter cited as Affirmative Action].

Strict adherence to the last hired, first fired policy of layoffs "locks in" the effects of past discrimination by

continuing the advantage white males gained in employment as a direct result of minimal or no competition from women and minorities in the past.

2. Courts must be free to impose affirmative color-conscious or gender-conscious remedies if they are to fully effectuate the broad public policy against employment discrimination.

In deciding that under §706(g) the provision of retroactive seniority was "generally appropriate" as a remedy for hiring discrimination, this Court carefully considered the effect of an affirmative remedy on incumbent employees. Franks v. Bowman Transportation Co., 424 U.S. 747, 799 (1976). It found "untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected." 424 U.S. at 755. The Court recognized that retroactive seniority could affect the expectations and prospects of other employees,

but concluded that the importance of the remedy was paramount. 424 U.S. at 777-78.

The result of the remedy approved in Franks is the possibility that some white male workers who have been on the job for some time may find themselves, in hard times, losing economic benefits, or even being laid off, as a result of seniority-based relief ordered.

In the instant case, the effect of the district court's order on the department's seniority system was minor. No black firefighter with less seniority than a white firefighter retained his job while the white firefighter was laid off. Brief of Petitioners Memphis Fire Department at A4. Approximately 29 white firefighters were bumped to a lower position where minority firefighters with the same amount of seniority were not. Id. at A5-9.

But, the fact that some individual white males may be disadvantaged by a

court-ordered temporary bypass of seniority in times of layoffs should not preclude a court from authorizing such affirmative relief. For this Court to allow its determination of an appropriate remedy to be governed by the expectations of individual white male firefighters is to ignore the overall fairness of the plan, and the fact that affirmative measures "often produce changes in our institutions that are beneficial to everyone, including white males." Affirmative Action at 36.

Nor should this Court be troubled by assertions of "reverse discrimination" by opponents of such affirmative remedies. Such charges are mere smokescreens designed to undermine full and effective enforcement of congressional intent to end race and sex discrimination in employment: "[T]he charge of 'reverse discrimination', in essence, equates efforts to dismantle the process of discrimination with that process

itself. Such an equation is profoundly and fundamentally incorrect." Affirmative Action at 41.

Adherents of color-blind or gender-neutral solutions to discrimination "[ignore] the context in which the problem of inequality has persisted in this country.. .." Wright, Color-Blind Theories and Color Conscious Remedies, 47 U. Chi. L. Rev. 213, 214 (1980)(hereinafter Wright). Discrimination is "an interlocking process involving the attitudes and actions of individuals and the organizations and social structures that guide individual behavior." Affirmative Action at 13. Discrimination in employment simply cannot be equated solely with individual prejudice or expressions of bias, for when the forces of individual attitudes and actions, in combination with those of organizations and relevant social structures "are at work anti-discrimination remedies that insist

on 'color-blindness' and 'gender-neutrality' are insufficient." Id. at 2.

Moreover, it is clear that Congress, in enacting anti-discrimination legislation has rejected a "color-blind" or "gender-neutral" theory of government, and directed government to employ its power to eradicate it. As Judge Skelly Wright has emphatically remarked, "to call such legislation 'color-blind' is a meaningless abstraction. Legislation against invidious discrimination helps one race and not the other because one race and not the other needs such help." Wright at 220-21.

Decisions of this Court demonstrate its sensitivity to and agreement with the principles discussed above. As Justice Blackmun stated in his opinion in Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 407 (1978), "[i]n order to get beyond racism, we must first take account of race....And in order to treat persons equally, we must treat

them differently. We cannot--we dare not--let the equal protection clause perpetuate racial supremacy." Likewise, in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), Justice Brennan refused to adopt a literal interpretation of §§703(a) and (d) of Title VII, which would have necessarily prohibited all race-conscious affirmative actions plans:

> The prohibition against racial discrimination in §§703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose...Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action 'would bring about an end completely at variance with the purpose of the statute' and must be rejected...(citations omitted)

See also Fullilove v. Klutznick, 448 U.S. 448 (1980)(upholding as constitutional a provision of the Public Works Employment Act of 1977 that required state or local governments to use 10% of federal funds

granted for public works contracts to procure services or supplies from minority-owned or controlled businesses).

In the difficult economic circumstances we now face, the teachings of this Court's cases on the importance of remedying discrimination must not be forgotten.

> In this charged atmosphere, there is a strong temptation to view affirmative action as pitting the rights of minorities and women against white males in a battle over diminishing resources. The challenge, however, is to maintain, indeed, to advance our commitment to equality without asserting one equity over another.

Affirmative Action at 6.

POINT III

THE DISTRICT COURT'S ORDER WAS NOT AN ABUSE OF DISCRETION AND SHOULD BE UPHELD

A. Equitable Relief Will Be Disturbed Only If It Constitutes An Abuse Of Discretion By the Lower Court

This Court has made clear that appellate review of the issuance of equitable relief is limited to determination of whether the district court abused its discretion, and will be disturbed only if evidence is insufficient to support the court's action. Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., 363 U.S. 528, 535 (1960); Albemarle Paper Co. v. Moody, 422 U.S. 405, 446 (1975)(Rehnquist, J. concurring). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); accord Swann v.

Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947).

Basic tenets of equity require a sensitive weighing of practicalities and balancing of public and private interests. As this Court has often noted:

> The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public and private needs as well as between competing private claims.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. at 15, quoting Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944). See also Lemon v. Kurtzman, 411 U.S. at 200.

Subsequent modification of equitable relief requires broad discretion. System Fed'n No. 91, Ry. Emp. Dept. v. Wright, 364

U.S. 642, 647-48 (1961); cf. Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978) (appellate review under Fed. R. Civ. P. 60(b)).

Because district judges are "uniquely situated...to appraise the societal forces at work in the communities where they sit," Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 470 (1979)(Stewart, J., concurring), appellate review of equitable relief also requires deference to the judgment of the district court. See, e.g., Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 779-80 (1976); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. at 12. In addition, the district judge has the unique experience of having managed the litigation in the past. See, e.g., Brown v. Board of Ed., 349 U.S. 294, 299 (1955).

Consistent with these principles of equity, the district courts must necessarily

retain flexibility to effectively address the varied situations which they confront. The rules governing eradication of race and sex discrimination should not be rigid and absolute. The district courts must not be deprived of the capacity to employ practical wisdom in fashioning remedies. The district court's order in this case was wholly appropriate and within the sound discretion of the court, and therefore should be upheld.

B. The District Court's Order Was Grounded Upon Sufficient Evidence of Discrimination And Therefore Was Not An Abuse of Discretion

The evidence of discrimination in the Memphis Fire Department contained in the record before the district court in the instant case was a sufficient basis for the district court's injunction. For example, between 1950 and 1976, the fire department hired only 94 black firefighters as compared to 1683 white firefighters. Between 1969 and 1975 only

7 black firefighters received promotions as compared to 386 white firefighters. In 1979, blacks constituted only two out of 25 administrative personnel, 6 out of 26 apparatus maintenance workers, 7 of 89 ambulance service personnel, 8 of 37 fire prevention workers and 3 of 50 communications workers. There were no black employees in the training and water or air mask service categories. Eight of the thirteen material service workers were black. Stotts v. Memphis Fire Department, 679 F.2d 541, 550-51 n.5 (6th Cir. 1982).

In fact, the evidence was so striking that both the district court and the court of appeals commented on it. The district court, when modifying the 1980 consent decree observed:

> While the agreement does not admit discrimination, it would be naive not to realize

> that the Fire Department of this City was very discriminatory towards black people for years, and it wasn't corrected properly until the Consent Decree was entered into this case.
>
> It is true that this Court never had hearings and made findings, but I could take judicial notice of that from the figures that are in the record of this Court.

Petition For a Writ of Certiorari at A73. Indeed, the court thought the history of discrimination so apparent that it was compelled to note "that the present situation resulted from prior discrimination, which is obvious." Id. at A76.

The Sixth Circuit, reviewing the district court's ruling found "[t]he statistics contained in this record represent a very strong prima facie case of employment discrimination." Stotts v. Memphis Fire Dept., 679 F.2d at 550-51 n.5. Examining the statistics included in the record, the court noted a revealing sign of purposeful dis-

crimination in hiring, that "[i]n the spring of 1981, blacks constituted only 11 percent of the Memphis Fire Department. Approximately 35 percent of the City of Memphis is black." Id.

Faced with similar statistical disparities, other courts of appeals have endorsed similar affirmative relief through consent decrees to overcome the effects of past discrimination. See, e.g., United States v. City of Miami, Fla., 614 F.2d 1322 (5th Cir. 1980), mod. in part on other grounds, 644 F.2d 435 (5th Cir. 1981)(approval of consent decree affording affirmative relief based on statistical disparities in racial composition); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980)(approval of consent decree affording affirmative action based on statistical disparities in racial composition).

C. The District Court, Pursuant To Its Duty To Enforce The Decree And Its Authority To Modify It In Light Of Changed Circumstances, Did Not Abuse Its Broad Equitable Powers

The lower court was confronted with a situation, engendered by the Mayor's proposed layoffs, that would have significantly undermined the consent decrees. Both the goals of the 1974 and 1980 consent decrees, approved by the court, were explicit:

> The City, therefore agrees to undertake as its long term goal in this decree, subject to the availability of qualified applicants, the goal of achieving throughout the workforce proportions of black and female employees in each job classification, approximating their respective proportions in the civilian labor force.

Stotts v. Memphis Fire Dept., 679 F.2d at 571. The 1980 decree was intended to parallel and supplement the 1974 decree. Id. at 548. The 1980 decree underscored and reaffirmed the goal of the 1974 decree particularly as it applied to representa-

tion of black citizens: "the goal shall be to raise the black representation in each job classification on the fire department to levels approximating the black proportion of civilian labor in Shelby County." Id. at 576.

The goal of the 1974 and 1980 consent decrees had not been accomplished when the Mayor issued his order regarding layoffs. The effect of the Mayor's proposed layoff policy on the ongoing goal of increasing the number of minorities in the department would have been drastic: "fifty-five percent of all minority Lieutenants and 46% of all minority Drivers would either have been laid off or demoted had the layoffs occurred."[12/] Id. at 549-50.

The lower court was under an obligation

12/ In addition to eradicating the progress made pursuant to the consent decrees, the City's plan had the potential for perpetuating discrimination in other city agencies by taking into account, in determining seniority, an employee's prior service in another agency.

to assure implementation of the goals of the consent decrees to increase the percentage of black employees in the fire department and to alleviate the effect of past discriminatory policies, and therefore expressly retained jurisdiction in the decree. According to Section 17 of the 1980 decree, "The Court retains jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." Id. at 578.

As fully discussed above, the Mayor's proposal not only would have halted progress towards achieving that goal, but also would have sanctioned backsliding, thereby eliminating much of the progress already made. In view of this probable result, the district court's order was necessary to slow any backward movement that might occur. See U.S. v. Armour Co., 402 U.S. 673 (1981).

Further, there is no question that the district court had inherent power to modify its equitable relief to adapt to new or changed circumstances. United States v. United Shoe Corp., 391 U.S. 244, 251 (1968); System Fed. No. 91, Ry. Emp. Dept. v. Wright, 364 U.S. 642, 647-48 (1961). The sudden layoffs--indeed, the first in the City's history--which were to occur in Memphis within several years after the signing of the remedial consent decree, posed an unforeseen threat to the ongoing remedy. As discussed above, had the layoffs been permitted, substantial eradication of all progress under the decree easily could have resulted without a modification of the remedial orders.

In these circumstances, modification of the prior consent decree was appropriate and necessary in order to prevent the substantial undoing of the remedy. Brown v. Neeb, 644 F.2d 551, 560 (6th Cir. 1981); Perrotte v. Percy, 489 F.Supp. 212, 214

(E.D. Wisc. 1980); Bolden v. Pennsylvania State Police, 73 F.R.D. 370, 372 (E.D. Pa. 1976), aff'd, 578 F.2d 912 (3d Cir. 1978).

The district court's decision represents that "special blend of what is necessary, what is fair, and what is workable," Lemon v. Kurtzman, 411 U.S. 192, 200 (1973), that characterizes equitable remedies. Thus, the order did not prohibit layoffs of sworn personnel altogether. Cf. Schaefer v. Tannian, 538 F.2d 1234 (6th Cir. 1976)(district court improperly enjoined layoff of male police officers; injunction against layoff of female officers was proper). It did not ban the layoff of all minority firefighters. The order did not require any additional measures of affirmative action, or require that white firefighters be replaced by new minority hirees. It merely sought to preserve the remedial status quo achieved through the consent decrees in the face of an unexpected fiscal exigency, accord,

Bridgeport Guardians, Inc. v. Members of the Bridgeport C.S. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981), which threatened to frustrate the progress made under the consent decrees. It did not overbear "the interests of state and local authorities in managing their own affairs..." Milliken v. Bradley, 433 U.S. 267, 281 (1977).

The district court's reasonable modification of the consent decrees is not invalid simply because it involved suspending the operation of the city's last-hired, first-fired layoff proposal. The mere existence of a seniority-based layoff plan cannot diminish "the scope of a district court's equitable powers to remedy past wrongs....for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971). Nor is the scope of

the remedial power under §706(g) of Title VII, 42 U.S.C.A §2000e-5(g)(West 1981), limited or qualified by the Congressional policy expressed in §703(h) of Title VII, 42 U.S.C.A. §2000e-2(h)(West 1981), of protecting bona fide seniority systems from attack as discriminatory. Franks v. Bowman Transportation Co., 424 U.S. 747, 758-59 (1976).

In Franks, this Court made clear that, in cases dealing with seniority systems, there is a significant "difference between a remedy issue and a violation issue," United Air Lines, Inc. v. Evans, 431 U.S. 553, 559 (1977). The instant case does not challenge the Memphis seniority-based plan as discriminatory, clearly distinguishing this case from the situation presented in Teamsters v. United States, 431 U.S. 324 (1977). Respondents, as well as the lower courts, focused exclusively on preserving the effectiveness of the remedy for the

initial violation, discriminatory hiring of minorities and women. See, Franks, 424 U.S. at 758.

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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